Supreme Court of the United States

OCTOBER TERM, 1953.

No. 250

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

JOHN W. LEARY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States.

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No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
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v.
JOHN W. LEARY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled action on May 14, 1953.

Opinions Below.

The opinion of the District Court (R. 111-113) is unreported. The opinion of the Court of Appeals (R. 119-131) is reported in 204 F. (2d) 461.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

Statement of Matter Involved.

This is an action brought under the provisions of the Federal Employers' Liability Act, 45 U.S.C. Secs. 51-60, and the Safety Appliance Act, 45 U.S.C. Secs. 1 and 9, to recover for personal injuries sustained at Madison, Connecticut, on September 13, 1946. The action was begun in the United States District Court for the Southern District of New York, and was transferred to the United States District Court for the District of Massachusetts by order of the United States District Court for the Southern District of New York by an order dated October 18, 1951 (R. 1). The case was tried before Judge Wyzanski and a jury on June 30, July 1 and July 2, 1952. On July 2 the petitioner presented a motion for a directed verdict, which was denied, and the jury returned a verdict for the respondent in the amount of $84,000 (R. 14, 15). Judgment was entered on July 2 in the above amount and costs were taxed at $38.50.

Before the case was submitted to the jury, respondent's counsel waived all counts except those under the Safety Appliance Act, and the case was submitted only on the issues of the violation of the Safety Appliance Act, causation and damages (R. 91).

During the cross-examination of the respondent the petitioner offered to prove that the respondent was receiving a disability pension to the cost of which the petitioner had contributed. The Court refused to admit the testimony (R. 66-68).

Before the Court instructed the jury, the petitioner filed requests for instructions (R. 17-21). After the Court had instructed the jury, the petitioner objected to part of the charge (R. 101) and to certain omissions from the charge (R. 102), which objections were overruled.

On July 11, 1952, the petitioner filed a motion for judgment notwithstanding verdict and motion for a new trial. The motion was denied on July 21, 1952 (R. 16). The petitioner filed notice of appeal on August 19, 1952 (R. 114), and was granted an enlargement of time for docketing appeal until November 17, 1952 (R. 118).

The Court of Appeals for the First Circuit affirmed the judgment of the District Court on May 14, 1953.

Statement of the Case.

The respondent, John W. Leary, brought this action to recover for injuries sustained between Clinton and Madison, Connecticut, on September 12, 1946, at about 3.30 a.m. The respondent was the conductor on a passenger train which had left Boston *en route* to New York City at 11.45 p.m. on September 11, 1946 (R. 22). The train consisted of either seven (R. 23) or eight (R. 106, Ex. 14A) cars at the time of the accident and had proceeded uneventfully until shortly after it had passed the station at Clinton, Connecticut (R. 56). At that time the engineer, whose name was Geary, told the fireman, Scanlon, that he thought the brakes were sticking, and asked Scanlon to look back and see whether he could see fire flying (R. 74). At the trial Scanlon was unable to remember whether he did, in fact, see fire flying, but testified that the term is used to indicate sparks caused by friction of the brakes against the wheels, which might be seen in the dark if the brakes were rubbing on the wheels (R. 75). The train involuntarily

came to a stop without the engineer's applying the air, because the brakes were sticking, at an unscheduled stop between Madison and Clinton, Connecticut. It does not appear that any member of the crew was aware at the time the train stopped that the front part of the locomotive was resting on a bridge or trestle over a highway described as Bishop Street. This was an open trestle bridge without any railing along the right of way. Photographs of the bridge were introduced in evidence and appear in the Record on pages 104, 105, 108, 109 and 110.

Prior to the stopping of the train Mr. Leary was riding in the head coach (R. 24). He heard the brakes go on in emergency, and the train came to an unscheduled stop. He got up and got his electric lantern, and went outside and stepped down to the ground on the engineer's side or right-hand side of the train (R. 25). The train was headed in a westerly direction, and the side on which he got out was the northerly side of the train. He met the engineer walking back from the engine. The engineer had a lighted torch in one hand and told him that there was a bad air leak, and they then walked back together toward the rear of the train to find it (R. 26). They found a broken air hose on the head end of the head sleeper. The engineer had brought back a spare hose with him, but it was not the right type and Leary said that he would go back to the engine and get another one (R. 27). In walking back toward the engine Leary went on the opposite side of the train, which would be the southerly side next to Track 2, or the eastbound main line (R. 28). He testified that the reason he went on that side was because the walking was better, as he had noticed on walking down the other side there was considerable loose ballast. On Track 2 side he could walk on the ties and the footing was firmer. When he got to the locomotive he climbed up on the rear end of the tender to

see if there was a spare hose in a tool box at the rear of the tender (R. 30, 58). Not finding one there, he climbed down on the northerly side of the train and went forward to the gangway of the locomotive. He had some conversation with the fireman, who was still on the engine, and the fireman handed him a hose—the type he was looking for. Leary then decided to walk around the front of the engine and go back on the Track 2 side rather than on the side where he then was, as he felt the walking would be better (R. 30, 60). He took a few steps toward the front of the engine and walked off into space. He testified that the weather was clear, but there was a ground fog and it was dark. There was no artificial light in the vicinity, except a glare that came from the ash pan of the engine. He did not know before he fell that any part of the locomotive was on the bridge and did not know he was near any bridge (R. 47). He knew that the train had gone past Clinton but did not know exactly where it was (R. 52). He knew that there were open trestle bridges between Clinton and Madison and knew that there was a bridge of this type somewhere beyond Clinton; at the time he fell he had with him an electric hand lantern with a bulb in the bottom (R. 62); he had to watch his step and be very careful; he was looking down to see where each foot was going, as he was walking along; he was watching the tank and could not see any distance in front; he had his lantern in his right hand but did not see any portion of the buttress; the first thing he knew his foot went right off, and he landed standing straight up (R. 65).

Scanlon was still on the engine when Leary fell, and he heard him crying for help and went to his assistance (R. 80). He did not know that the front of the engine was on the bridge (R. 75), and did not know it was there until he got down from the engine and started forward with a

flashlight and saw the edge of the abutment just as he got to it (R. 81). He went forward about 8 feet before he reached the abutment, and, realizing that Mr. Leary had fallen, he got other members of the train crew, who carried Leary back and put him on the train.

Statutes Involved.

The pertinent sections of the Safety Appliance Act (45 U.S.C.) are as follows:

"SEC. 1. *Driving-wheel brakes and appliances for operating train-brake system.*

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

. . . . . .

"SEC. 9. *Number of cars to be operated with power or train brakes; increase of number.*

"Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used

and operated; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

. . . . . .

[The following section is included only for purposes of comparison.]

"SEC. 11. *Safety appliances required for each car; when hand brakes may be omitted.*

"It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

Questions Presented.

1. Was the evidence sufficient as a matter of law to present a question for the jury as to violation of the provisions of the Safety Appliance Act?

2. If there was a violation of the Safety Appliance Act, was the evidence sufficient as a matter of law to present a question for the jury as to whether the violation was the proximate cause of the respondent's injuries?

3. If there was a jury issue on the question of causation, was there error in the failure of the trial judge to charge as requested as to the difference between legal condition and legal causation?

4. Did the trial judge commit error in refusing to admit evidence offered by the petitioner that the respondent is receiving disability payments to the cost of which the petitioner contributed?

Reasons Relied on for Allowance of the Writ.

1. The case involves the application of Sections 1 and 9 of the Safety Appliance Act in circumstances which have not been previously considered by this Court. It is submitted that the standard applied to those sections by the Court of Appeals was error.

2. The Court of Appeals erred in holding that the respondent had made out a question for the jury on the question of proximate cause.

3. The Court of Appeals erred in holding that the jury was adequately instructed on the question of proximate cause.

4. The Court of Appeals erred in holding that there was no prejudicial error in refusing to allow petitioner to offer evidence that respondent was receiving disability pension

from the United States Government under the Railroad Retirement Act. This is a matter not previously determined by this Court.

Wherefore the petitioner prays that this petition be granted and that a writ of certiorari issue.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are stated in the petition filed herewith.

Argument.

I.

THE EVIDENCE IN THIS CASE WAS NOT SUFFICIENT AS A MATTER OF LAW TO WARRANT A FINDING THAT THERE WAS A VIOLATION OF SECTIONS 1 AND 9 OF THE SAFETY APPLIANCE ACT.

The petitioner submits that the only sections of the Safety Appliance Act which are applicable to air brake equipment are Sections 1 and 9. These sections are set forth in the petition. Petitioner's position is not that the provisions of these sections are not mandatory, but rather that the mandate was not violated. It is a different mandate from that found in Section 11. Section 1 is specific as to power-brake equipment on locomotives and requires that there must be a sufficient number of cars equipped with power or train brakes so that the "engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." It is to be noted that Section 1 is not even specific as to the number of cars to be equipped, provided that the engineer can control its speed without requiring brakemen to use hand brakes. Section 9, which is a later enactment, specifies that not less than 50 per cent of the cars shall have their brakes used and operated by the engineer, and that the brakes on the cars which are associated together shall be so used and operated, and the Interstate

Commerce Commission is given authority to increase the percentage of cars so used and operated.

Although there was no evidence at the trial of any Interstate Commerce Commission orders, it is understood that the percentage of cars has been increased by the Interstate Commerce Commission as permitted by Section 9 to 85 per cent.

It seems clear from the statute and from the order of the Commission that the most that is required is to have brakes on 85 per cent of the cars that can be controlled from the engine, so that the train can be brought to a stop without the use of hand brakes. There is no question that the engine and cars were equipped as required by the statute. From the very nature of the air-brake system, if there is a leakage of air the train will stop without the necessity of using hand brakes. It is clear that the underlying purpose of the sections relating to air brakes is to prevent accidents caused by inability to bring trains to a stop, and also to prevent accidents to employees from the necessity of having to use hand brakes while the train is in motion.

Sections 1 and 9 do not contain other mandatory provisions such as are found in Section 11 of the Act: "All cars must be equipped with . . . efficient hand brakes . . ." While Section 11 does impose an absolute duty to have efficient hand brakes, the language of the sections relating to air brakes contains no such provision nor any other standard, but merely requires that the brakes must be sufficient to bring the train to a stop without the use of hand brakes.

The Court below felt that it was bound by *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, in its interpretations of the sections of the statute.

We are therefore faced at the outset with the necessity of distinguishing that case. It is true that in the *Coray* case the train had stopped because of a defect in the air-

brake system and was run into by a motor car following on the same track, and this Court stated that the air had escaped because of a violation of the Federal Safety Appliance Act. The Court did not refer to the particular section of the statute that was claimed to have been violated, and nothing more appears as to the alleged violation other than that the threads on a valve were so badly worn that a nut became disconnected. The question of violation does not appear to have been argued in this Court, although an examination of the record indicates that the question was raised in the trial Court. The trial judge, however, directed a verdict for the defendant on the question of causation, and the Utah Supreme Court sustained the directed verdict on that issue alone after asserting that there had been a violation of the Act.

Coray v. *Southern Pacific Co.* (Utah), 185 P. (2d) 963.

It is therefore submitted that the question of violation of the statute was not fully considered by any of the three Courts that passed upon the *Coray* case. The cases cited by this Court in the *Coray* opinion in support of the statement that the Act "commands railroads not to run trains with defective brakes" do not appear to support that proposition as to air brakes. Only two of the cases cited involve the question of air brakes. In the first, *Fairport, Painesville & Eastern Railroad Co.* v. *Meredith,* 292 U.S. 589, 597; 79 L. Ed. 1446, 1451, the train was not able to stop at a crossing, because the air brakes were not hooked up at all. The other, *Spokane & Inland Empire Railroad Co.* v. *Campbell,* 241 U.S. 497, involved a collision of trains, and there was evidence that, when the engineer applied his air brakes, they failed to work, and he was unable to stop the train. The other cases cited arose under other sections of the statute

where the provisions undoubtedly were mandatory, and the mandate was not that found either in Section 1 or 9.

Brady v. *Terminal Railroad Assn.*, 303 U.S. 10 (defective grab-iron).

Louisville & Nashville Railroad Co. v. *Layton*, 243 U.S. 617 (defective coupler).

Davis v. *Wolfe*, 263 U.S. 239 (defective grab-iron).

It is submitted that, since the question of interpretation of Sections 1 and 9 was not squarely raised before this Court in the *Coray* case, the statement by the Court that there was a violation is not binding on all future cases where there is a stopping of a train due to any air-hose defect. It is apparent that the Court was applying to the facts in that case the standard set up for hand brakes in Section 11 of the Act, which is not to be found in either Section 1 or Section 9 of the Act relating to air brakes.

In *O'Donnell* v. *Elgin, Joliet & Eastern Railway Co.*, 338 U.S. 384, a case involving Section 2 of the Act, a similar distinction was pointed out by Mr. Justice Burton (dissenting) at page 394:

> "We do not agree that the Safety Appliance Acts contain a mandatory requirement that cars used in moving interstate traffic must be equipped with couplers that 'will remain coupled until set free by some purposeful act of control.' Congress might have so legislated, as it did in the section which required cars to be equipped with 'efficient hand brakes; . . .' However, it did not do so."

It is respectfully submitted that on the facts in this case the Court of Appeals erred in holding that the defect in the

air hose was a violation of Sections 1 and 9 of the Safety Appliance Act, and should have held as a matter of law that there was no violation of the applicable sections of the Safety Appliance Act.

II.

IF THERE WAS A VIOLATION OF THE SAFETY APPLIANCE ACT, THE EVIDENCE WAS NOT SUFFICIENT TO WARRANT SUBMITTING THE CASE TO THE JURY ON THE QUESTION OF PROXIMATE CAUSE.

It is the petitioner's contention that, even if a violation of the Safety Appliance Act could have been found, the violation was a mere condition and was not the proximate cause of the respondent's injuries.

Even where violation of a duty is established, the trial Court should direct a verdict for the petitioner if the evidence is not sufficient as a matter of law to establish that the violation is the proximate cause of the injury.

> *Brady* v. *Southern Railway Co.* (1943), 320 U.S. 476, 483; 88 L. Ed. 239, 245.

This Court in the case just cited adopted the language from *Milwaukee & St. Paul Railway Co.* v. *Kellogg*, 94 U.S. 469, 475, as follows:

> "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Davis* v. *Wolfe* (1923), 263 U.S. 239, 243, this Court said, after reviewing four of its earlier opinions involving the Safety Appliance Act:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Acts if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury;* and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." (Emphasis added.)

It is the petitioner's contention that the case at bar falls within the first part of the rule of *Davis* v. *Wolfe*, and that the breakdown of the train was merely a condition and not the proximate cause of the accident.

Davis v. *Wolfe* is cited in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 523, after the Court says ". . . petitioner was entitled to recover if this defective equipment was the *sole or a contributory proximate cause* of the decedent employee's death." (Emphasis added.)

Although in the *Coray* case this Court held that the question of causation was for the jury, it is here submitted that the case at bar is distinguishable from that case on its facts. The Court of Appeals recognized the distinction, but nevertheless held that the situation in the case at bar presented a question for the jury.

In *Coray* the accident was direct and almost immediate following the stopping of the train. As this Court said, "all

of these circumstances were inseparably related to one another in time and space" (p. 524).

In the instant case there was not only an intervening lapse of time and space, but an entirely independent situation which was the cause of the accident. It is undisputed that there was an open and unguarded bridge or opening on the petitioner's right of way, and that the respondent fell into it. Whether or not this constituted negligence on the part of the railroad is not material, in view of the fact that the respondent has chosen to rely entirely upon a violation of the Safety Appliance Act as the cause of the injuries. In any event, an accident may be caused by an act or a situation which is not due to negligence on the part of anyone. The existence of this unguarded opening, together with Leary's failure to observe it, was the cause of the accident, rather than the remote condition which brought the train to a stop. While it is true that Leary's contributory negligence as such would not bar recovery, nevertheless, if his conduct, whether negligent or not, could be found to be the sole cause of the accident, of course he could not recover.

Great Northern Railway Co. v. *Wiles,* 240 U.S. 444; 60 L. Ed. 732.

The case at bar is very similar to *Reetz* v. *Chicago & Erie Railroad Co.* (6 Cir. 1931), 46 F. (2d) 50.

There a train parted due to breaking of couplers and draw bars. The plaintiff's decedent took his lantern and started to walk to the forward part of the train to find the trouble and get the train under way. Unknown to him the train had stopped over an unguarded bridge, and he fell to the way below. One of the bases of liability asserted was violation of the Safety Appliance Act. The Court, applying the rule of *Davis* v. *Wolfe,* 263 U.S. 239, held that violation

of the statute was not the proximate cause of the accident, and sustained the directed verdict.

At page 51 the Court said:

> "Reetz's fall had no direct relation to the defective draw bar. It was not the instrumentality which caused his death, even though, because of its failure, the condition was created whereby Reetz happened to be at the place where he was injured."

The Court then points out the difference between collision and non-collision cases involving safety violations as follows (p. 52):

> "A careful consideration of the noncollision cases . . . leads us to the conclusion that at least in those cases where there has been a failure of a required appliance, there is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about. Here the incidental situation existed, but the defective appliance bore no other relation to the injury."

In some of the cases a great deal of emphasis is put on the wording of the Federal Employers' Liability Act "in whole or in part." The words "in part" really add nothing to the common-law concept of causation. Even though it is true that the negligence or violation of duty does not have to be the *sole* cause, it still has to be *a cause* of the injury, and a mere condition still is not *a cause*. Thus, as the Court points out in *Spokane & Inland Empire Railroad Co.* v. *Campbell*, 241 U.S. 497, the contributory negligence of the plaintiff, not

being a bar to the action, although *a cause*, does not bar recovery where the defendant's violation of duty is also *a cause*. But it is perfectly clear that the defendant's violation of duty still has to be *a cause* and nothing less.

See Restatement of the Law of Torts, Sec. 430, Comment (*d*).

Other cases where recovery has been denied as a matter of law for lack of causation between violation and injury are:

Lang v. *New York Central Railroad Co.* (1921), 255 U.S. 455.

St. Louis & San Francisco Railroad Co. v. *Conarty* (1915), 238 U.S. 243.

McCalmont v. *Pennsylvania Railroad Co.* (6th Cir. 1922), 283 F. 736.

In each of the foregoing cases it is clear that the accident would not have occurred if there had not been a violation of the statute, yet the Courts held that the violation was a mere condition and not a cause of the accident.

These cases illustrate the proposition that, in order to satisfy the requirement of legal cause, the plaintiff must show something more than failure of duty preceding an accident. The failure of duty must be a substantial factor in bringing about the end result, something more than the so-called "if, but for" cause.

See Restatement of the Law of Torts, Sec. 431, Comment (*a*).

The petitioner submits that, on the evidence most favorable to the respondent in this case, the breakdown of the train was a mere condition, and that the trial judge should have directed a verdict for the petitioner because the respondent failed to prove as a matter of law that any failure

of duty arising out of the violation of the Safety Appliance Act caused his injuries, and that the Court of Appeals should have reversed the ruling of the trial judge.

III.

THE TRIAL JUDGE ERRED IN FAILING TO CHARGE THE JURY AS REQUESTED AS TO THE DIFFERENCE BETWEEN LEGAL CONDITION AND LEGAL CAUSATION.

If there was a question for the jury on the issue of causation, instructions should have been given on the meaning of legal causation as distinguished from legal condition. The petitioner does not contend that, so far as the judge's charge went, it was not correct, but it fell short of giving the jury any of the basic principles of legal causation. To tell a group of laymen that they must be satisfied in their own minds that there was "some kind of connection of a causal nature between the failure of the brakes and the injury which occurred" is wholly inadequate. The petitioner submits that in a case of this kind it is entitled to have the jury instructed, not as to "some kind of connection," but as to *what kind* of connection it is proper for them to find. As the charge was left, the jury could find, and obviously did find, that the mere stopping of the train due to the leaking of air was the cause of respondent's injuries. In the absence of any instruction as to the difference between legal cause and legal condition they were free to assume that the "but for" cause was an adequate ground for satisfying the requirements as to causation in the case. "If the train had not stopped, the plaintiff would not have been hurt" is probably as far as the jury ever went.

Many of the cases cited in the preceding section of this brief illustrate the distinction as a matter of law between legal cause and legal condition. In most of those cases a

verdict was directed because the Courts held as a matter of law the failure of duty was a mere condition and not a cause.

Brady v. *Southern Railway Co.* (1943), 320 U.S. 476.
Lang v. *New York Central Railroad Co.* (1921), 255 U.S. 455.
St. Louis & San Francisco Railroad Co. v. *Conarty* (1915), 238 U.S. 243.
Reetz v. *Chicago & Erie Railroad Co.*, 46 F. (2d) 50.

In other cases the necessity for applying the distinction by adequate instructions to the jury is recognized where there is a question of fact for the jury.

Davis v. *Wolfe* (1923), 263 U.S. 239, 243.
Brumberger v. *Burke*, 56 F. (2d) 54, 56.

Even in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, this Court recognizes that proximate cause is the necessary basis for recovery.

In *Detroit City Gas Co.* v. *Syme* (6 Cir. 1940), 109 F. (2d) 366, speaking of the charge in the trial Court, the Court of Appeals said (p. 369):

> "It fails to distinguish between efficient and inefficient causes; between remote and immediate causes; *between circumstances that are causes and those that are mere conditions;* and fails to admit of the possibility of an efficient intervening cause which, notwithstanding other causes, may come to be in some circumstances, the sole efficient cause of the accident, and so its proximate cause." (Emphasis added.)

The language of the Court in the case just cited may be used to describe the charge in the instant case. The petitioner was entitled at least to have the jury instructed as to the difference between legal cause and legal condition.

It is submitted that the failure of the trial judge to charge as requested was prejudicial error, and the Court of Appeals should have reversed for that reason.

IV.

THE TRIAL JUDGE ERRED IN REFUSING TO ADMIT EVIDENCE OFFERED BY THE PETITIONER THAT THE RESPONDENT IS RECEIVING A DISABILITY PAYMENT TO THE COST OF WHICH THE PETITIONER CONTRIBUTED.

It is petitioner's contention that it was entitled to put in evidence in mitigation of damages the facts (1) that Leary was receiving a pension based on his disability under the provisions of the Railroad Retirement Act of 1937 (45 U.S.C. Sec. 228a *et seq.*), and (2) that the petitioner had contributed to the cost of this pension under the provisions of the Carriers Taxing Act (45 U.S.C. Sec. 263).

A similar question was raised in the case of *McCarthy* v. *Palmer* (2d Cir. 1940), 113 F. (2d) 721. There the Court overruled the defendant's contention on the ground that the trial judge had found as a fact that the plaintiff was not totally and permanently disabled.

That case, therefore, is not a precedent in the present situation, and the language, by implication, indicates that, if the disability were proved, the defendant would have been entitled to the benefit at least of the amount paid in by it for the plaintiff's pension.

In *Hetrick* v. *Reading Co.*, 39 F. Supp. 22 (1941), the District Court of New Jersey, after reviewing the *McCarthy* case, ruled that the defendant was not entitled to set up its payments in mitigation of damages.

We do not believe that the precise question has been passed upon by this Court.

It is submitted that in principle evidence should be admitted to show at least the extent of the petitioner's contribution to the disability payments. The petitioner is to some extent paying twice for the same disability. The situation is not the same as that where the injured person gets benefits from an insurance policy for which he alone has paid the premiums, or where he gets compensation from a collateral source. In this case the petitioner has contributed toward whatever annuity the respondent is receiving. This fact relates the situation to the familiar principle that a plaintiff cannot set up as an element of damage anything as to which he has received compensation from defendant.

Southwestern Brewery & Ice Co. v. *Schmidt*, 226 U.S. 162, 169.

Conclusion.

For the reasons stated in the petition and in this brief the application for a writ of certiorari should be granted.

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Supreme Court of the United States

October Term, 1953

No. 250

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

vs.

JOHN W. LEARY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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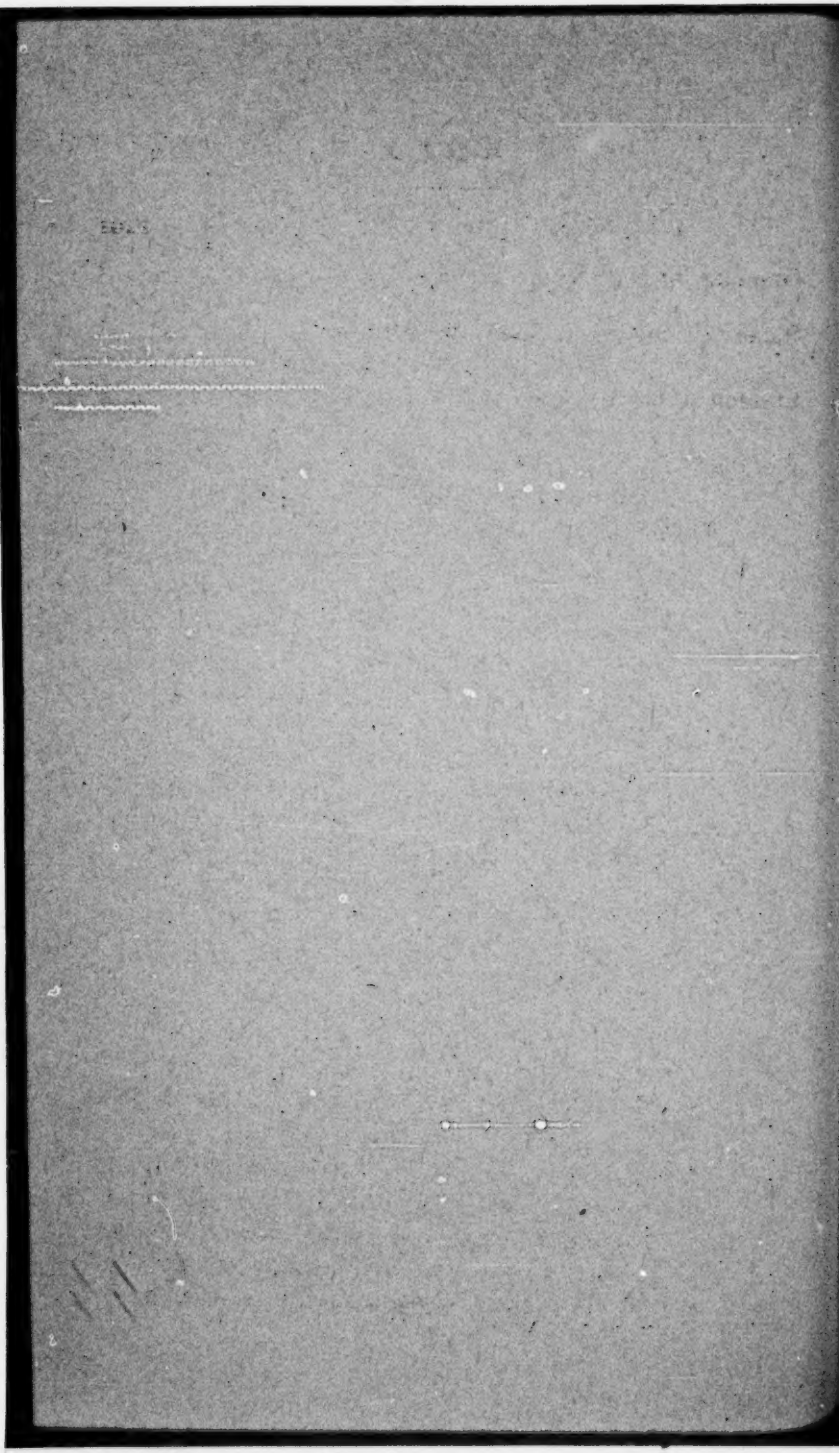

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POINTS:

I—All the evidence herein established that this defendant's train had a defective air-brake-hose that "burst", and this caused this express train to make a sudden unscheduled and unintended stop in an unguarded and very dangerous place on a dark-foggy night, on a trestle-bridge over a highway on defendant's right-of-way; and this defective air-brake-hose *indisputably* was a violation of the United States "Safety Appliance Act" which "resulted" in immediate, unexpected and unknown dangerous hazards, and plaintiff's injuries.

However, the District Judge left this question of "causation" to the jury as a question of fact (R. 94-95).

Sophistical contentions and the introduction of dialectic subtleties in this Court is not permissible to overturn or avoid the established fact of defendant's causal neglect (*Coray* v. *So. Pac. R. Co.*, 335 U. S. 520),—even though it is claimed

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that the injury resulted only in part from the defendant's neglect—or that defendant's negligence was merely "contributory" (*Coray* case, *supra*).

All of the facts and circumstances of this "bursting" of the air-brake-hose,—stopping this express train in this very dangerous place, and plaintiff's injuries, "were all inseparably related to one another in time and space". (*Coray* case, *supra.*) 12

II—The Court's charge to the jury on "causation" was adequate, complete, and indeed replete (R. 93, 94, 95, 99, 100). The "record" presents no question reviewable here as to "legal causation";—there was no objection to the charge as required by Rule 51 of the Federal Rules of Civil Procedure; nor any petitioner's request for instruction on any such question, and no exception to the Court's charge on causation, which charge petitioner now seeks to review in this Court..... 24

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Supreme Court of the United States

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No. .....

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

vs.

JOHN W. LEARY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below

The opinion of the District Court (Wyzanski, J.) (R. 111-113) is not reported. The opinion of the Court of Appeals (R. 119-131) is reported in 204 F. 2d 461.

Summary and Short Reply to Petition

The *petitioner,* in its brief in support of its petition for a writ of certiorari, *contends* (Argument I, p. 10) that although this respondent's verdict was based upon the petitioner's violation of the Safety Appliance Act (in that the air-brake-hose on its express train in question

"burst" and suddenly stopped the train in a very dangerous place at night—where there were no lights and it was foggy and very dark—with the engine partly over its short trestle over a public highway, which all led directly to the respondent, the conductor of the train, being severely injured while attempting in this dangerous situation to have the "burst" air-brake-hose replaced) *the Safety Appliance Act was not violated, and that the provisions of Sections* 1 *and* 9 *of the Safety Appliance Act are not mandatory.*

This amazing suggestion or contention of the petitioner is utterly unsound and contrary to the record and all of the relevant decisions of this Court.

The petitioner then contends further in its argument (II, p. 14) that *if* there was a violation of the Safety Appliance Act,—the evidence was not sufficient to warrant submitting the case to the jury on the question of proximate cause.

We will hereinafter call attention to the parts of the record which will demonstrate that the violation of the Safety Appliance Act suddenly *stopped this defendant's express train in the very dangerous place as aforesaid,* and this stoppage in and of itself caused the respondent, in accordance with his duty as conductor of the train, to do all he reasonably could to have this train start again and proceed to its destination, and while so doing he was very severely injured;—and that the petitioner is liable because, in the language of Mr. Justice Black, *"the negligence of the employer may be determined by viewing its conduct as a whole. And especially is this true* • • • *where the several elements from which negligence might be inferred are so closely interwoven as to form a single*

(*All italics and emphasis herein are Respondent's*).

pattern, and where each imparts character to the others." (*Blair* v. *Baltimore & Ohio Railroad Co.*, 323 U. S. 600).

This justifies respondent's counsel at this point to herein immediately call attention to the District Trial Judge's opinion (R. 111-113), and especially to where the Court said:

> "With regard to the issue of causation, I point out that once the train had stopped due to a defective braking mechanism, a defective hose, it became incumbent upon the conductor, the plaintiff in this case, in accordance with his obligation under his employment contract, to go back and get a second hose (the first hose not being satisfactory). Having procured the second hose he had two choices as to which side of the train he should use in proceeding backward with the hose. Whichever choice he took the jury might easily have thought presented elements of danger. On the one side was the track on which a train might be going in an opposite direction from the direction in which the conductor's train was going; on the other side was uncertainty, with the possibility of a bridge or a bank without a sufficient safeguard or protection. For reasons which the jury thought adequate, the plaintiff chose to go on the side on which there was no other track. As he proceeded he slipped and fell. It is not without relevance that a man who went to the rescue of the plaintiff started and slipped in the same direction,—thus fully supporting any inference the jury may have drawn that the protection was inadequate and that the fall was not due to the carelessness of the plaintiff, if that carelessness may under any circumstances be thought to be relevant in a case

> arising under a statute which does not open up the possibility of the defense of contributory negligence or the defense of the assumption of risk. In short, it seems to me, within the language of Mr. Justice Black in the case already referred to, the plaintiff proved enough to permit a jury to make an inference that violation of the Federal Safety Appliance Act was in law the adequate cause of the damages sustained."

It is not essential to add anything more to the question of "causation" raised by the petitioner than to present the above quotation,—which conclusively shows that the *petitioner's violation of the Act was not only a proximate cause or one of the causes, but in fact the fundamental, basic, initial and continuing cause of plaintiff's injuries.*

The petitioner took no exception to the Court's charge and made no request to instruct the jury upon the question of causation, as required by Rule 51 of the Federal Rules of Civil Procedure, even when the Trial Judge in effect suggested that petitioner might possibly desire to make some requests (R. 102). If the petitioner desired any further charge upon the matter of causation, then, under the aforesaid Rule 51, petitioner was obliged to make a request and objection before the jury retired to consider its verdict, "*stating distinctly the matter to which he objects and the grounds of his objection* * * *".

We believe that it will be found that the defendant's Point IV is obviously without any merit whatever.

The Court of Appeals opinion herein (204 F. 2d 461) in Subdivision 5, states at page 467:

> "Appellant's final contention is likewise without merit. There was no prejudicial error in refusing to allow defendant to show that plaintiff was receiving disability pension from the United States Government under the Railroad Retirement Act which should be considered in mitigation of damages."

The opinion then goes on in detail, in this Subdivision 5 and Subdivision 6, to demonstrate how baseless this claim is.

In addition to all of the above on this question, we call the attention of the Court to the fact that this alleged defense was not pleaded (R. 12-14). See Federal Rules of Civil Procedure, General Rules of Pleading, Rule 8 (c) and 13. Under these rules petitioner was obliged to plead any alleged payment or set-off in reduction of damages.

The petitioner's contention is that it was entitled to put in evidence, in mitigation of damages, the fact that Leary was receiving a pension based on a disability under the provisions of the Railroad Retirement Act of 1937 (45 U. S. C., Sec. 228a, et seq.), and that petitioner had contributed to the cost of this pension under the provisions of the Carriers Taxing Act, (26 U. S. C., Int. Rev. Code, Sec. 1500, et seq.).

Respondent contends that neither the petitioner's answer herein (R. 12-14) nor the appeal record presents its claim, and in any event this claim is utterly unsound and without merit.

This contention of the petitioner was so obviously without any foundation or merit that the District Judge did not even refer to it,—probably because it was not in any way presented. (See Federal Rules of Civil Pro-

cedure, General Rules of Pleading, Rule 8 (c), which requires a defendant to set forth any alleged payments or set-off in reduction of damages.) Having failed to so plead, the petitioner could not put in any evidence to establish any alleged set-off, and certainly cannot now raise the question upon this appeal. Also see Rule 13, same Rules.

As a matter of fact and law the petitioner made no such payments to the respondent (R. 66-68).

Therefore, obviously, this petitioner's last argument is demonstrably without any merit whatever.

Statement of the Case

The plaintiff was the conductor on defendant's express passenger train which left Boston for New York at 11:45 p. m. on September 12, 1946 (R. 22). The train consisted of either seven or eight cars (R. 22, 106; Ex. 14a), at the time it made this *unscheduled and unintended stop* shortly after the train passed the railroad station at Clinton, Connecticut (R. 56).

At that time Geary, the engineer, told the fireman, Scanlon, that he thought the brakes were "sticking", and asked Scanlon to look back and see whether he could see "fire flying", which term he used to indicate sparks caused by friction of the brakes against the wheels (R. 74).

The train involuntarily came to a stop without the engineer applying the air, because "of a defective air-brake-hose and the brakes sticking"—and the train therefore made an unscheduled and unintended stop.

As stated in petitioner's brief (p. 5), of course the plaintiff, Leary, was *unaware at the time the train stopped that the front part of the locomotive was resting on a*

bridge or trestle over a highway described as Bishop Street. This was an open-sided trestle bridge without any railing along the right of way. (Photographs of the bridge were introduced in evidence and appear in the Record on pages 104, 105, 108, 109 and 110.)

Before the train stopped, the plaintiff, Leary, was riding in the head coach immediately to the rear of the baggage car. He heard the *brakes go on hard in emergency,* and the train came to this unscheduled sudden stop (R. 24-25).

At the trial it was conceded that this unintended, unscheduled stoppage of this express train was caused by the air-brake-hose bursting, which caused the compressed air to go on in emergency and stop it (R. 84; also Exs. 14A and 14B, R. 106-107).

Then the plaintiff got his electric lantern and "went out" and met the engineer coming up from the engine, heading back to the rear end of the train from the engine. The engineer had a regular engine "torch" which burns kerosene—in a sort of an open flame (R. 25).

From Boston to New York is called westbound and the engineer's side of that train was on its right, or the right-hand side—the north side—of the train. At this point there were two tracks, one westbound from Boston and one eastbound toward Boston (R. 26).

The engineer told Leary he had a bad air leak so they went towards the rear to find it. They walked back on the same side—the engineer's side (R. 26).

When they got back they heard the air escaping from the other side and the brakeman went in and opened the trap. They then went from one side to the other (R. 26).

The air hose was on the head end of the head sleeper.

"So we went over and found the broken air hose * * * the engineer had a hose, I can't quite remember, either that or he went back to the engine to get a hose, but when he come down, him and the brakeman was taking the old hose off, which is screwed into a train pipe or water pipe, and I happened to notice the hose he brought down, instead of being a regulation air hose, it is a spreader, it has a coupler on both ends. One end of the air hose has threads on it that you screw into the train line.

"I said, 'The air hose is no good, I will go back and get another one while you are taking that one off'.

(The difference is) "the regular hose that would go on the train has a coupler on one end of it that couples with the air hose on the next car. On the other end it has threads that screw into the train line that lets the air pass through.

• • • • • • • •

"I went up to the engine. I took the one he brought down, the spreader, and I went up to the engine to get the regulation air hose.

"When I got up to the head end of the baggage car, the tool box was on the right hand side of the engine so I climbed between the tank of the engine and head of the head baggage car and I got down and the fireman stuck his head out of the gangway and he said, 'What do you want, Jack' and I said, 'I have to have another hose.' He said, 'I got one up here' and I said, 'All right' so I walked up to the gangway of the engine and he handed me one hose and I handed him the other.

"Q. Before you go any further I want to ask

you this: when you left the place where they took off the hose to go back toward the engine did you go back on the same side you had come down on? A. No, I went up on track 2 side on account of the bad walking on the engineer's side.

"Q. Tell us now what you mean, what you noticed about the bad walking on the engineer's side when you were walking down from the engine to the place opposite where the hose was broken. A. Well, there was a lot of loose ballast there. The track—there was a lot of that spread all around. In other words the track looked as though there had been new work done and it wasn't properly trimmed.

* * * * * * * *

"When a track is properly trimmed there is a space to walk. There is a space on the other side. The rock ballast is, what they call the shoulder of it, is up there and over here is clear ground.

"There was a lot of loose rock ballast and it was hard walking. That is why I walked up on track 2 side, I walked up on the ties, it was better walking, more level, solid footing.

"Q. Was there solid footing on that side? A. On track 2?

"Q. On the place where you came down? A. No, bad walking." (R. 26-28.)

After he got the hose he started to walk around the head of the engine so as to go back track 2, and "I probably took half a dozen steps, I don't know, and I just walked right into space" (R. 30).

Plaintiff then said that, when he "went off", the place where he landed (as he knows now) was in the middle of

the street (R. 34). There was an underpass going underneath the tracks, and there were no lights or illumination around there at all in the way of lamps, lampposts, electrical or otherwise (R. 34).

It was a dark night with a lot of ground fog. You could see the ground, but it hung above the ground.

You could not see the front of the locomotive, and before he was hurt he did not know whether or not any part of the locomotive was over the highway or on this bridge, and when he was walking just before he was hurt he did not know he was near any bridge (R. 34).

He landed on his feet and went backwards. He did not know where he was going (R. 34).

> "Q. And finally did you lay down or roll over or just what was your position? A. I fell backwards on my—I was sitting down when I come to." (R. 35.)

He tried to get off the street, but couldn't.

Scanlon, the fireman, heard the "cry for help" (R. 80), and "I went down the gangway on the engineer's side and ran towards the direction of the cry • • • *I got over to the edge of the bridge and I stopped myself in time.* Looked down and saw Leary on the street below" (R. 81):

> "Q. Then were you asked this question and did you give this answer. (Reading):
>
> " 'Q. You say you got over to the edge of the bridge and stopped yourself in time. What do you mean by that? A. I went over towards the bridge abutment there, too, and I just caught myself on the edge.' • • •
>
> "A. That's right.

"Q. That's true, isn't it? A. That's right.

"Q. *And that is what you meant, just caught yourself on the edge or you yourself would be over; is that right?* A. *That's right.*" (R. 81-82.)

Also see the following comment of the Court on this fact (R. 112):

> "It is not without relevance that a man who went to the rescue of the plaintiff started and slipped in the same direction,—thus fully supporting any inference the jury may have drawn that the protection was inadequate and that the fall was not due to the carelessness of the plaintiff, if that carelessness may under any circumstances be thought to be relevant in a case arising under a statute which does not open up the possibility of the defense of contributory negligence or the defense of the assumption of risk. In short, it seems to me, within the language of Mr. Justice Black in the case already referred to, *the plaintiff proved enough to permit a jury to make an inference that violation of the Federal Safety Appliance Act was in law the adequate cause of the damages sustained.*"

The air brakes of the train when coupled together constituted one continuous unit. A defect or breakage of one hose on one car put all the brakes in the entire train line in emergency and made them all inoperative. It was not a question of only one air hose and one brake on one car becoming inoperative—the brakes on every car in the continuous line went into emergency and they were all inoperative.

Finally, the engineer and brakeman made a cradle out of their arms and carried him over the bank, and lifted him into the head coach (R. 36).

ARGUMENT

I

All the evidence herein established that this defendant's train had a defective air-brake-hose that "burst", and this caused this express train to make a sudden, unscheduled and unintended stop in an unguarded and very dangerous place on a dark-foggy night, on a trestle-bridge over a highway on defendant's right-of-way; and this defective air-brake-hose INDISPUTABLY was a violation of the United States "Safety Appliance Act" which "resulted" in immediate, unexpected and unknown dangerous hazards, and plaintiff's injuries.

However, the District Judge left this question of "causation" to the jury as a question of fact (R. 94-95).

Sophistical contentions and the introduction of dialectic subtleties in this Court is not permissible to overturn or avoid the established fact of defendant's causal neglect (Coray v. So. Pac. R. Co., 335 U. S. 520),—even though it is claimed that the injury resulted only in part from the defendant's neglect—or that defendant's negligence was merely "contributory" (Coray case, supra).

All of the facts and circumstances of this "bursting" of the air-brake-hose,—stopping this express train in this very dangerous place, and plaintiff's injuries, "were all inseparably related to one another in time and space". (Coray case, supra.)

It is very clear that the Act commands a railroad company not to operate an interstate railroad train, such as the one involved herein, with defective power-brakes.

It is also undeniable that the abrupt and unexpected stoppage of this train, due to its defective air-brakes, surely resulted in immediate, unexpected and unknown dangers to the train crew.

The provisions of this Act with reference to power train brakes apply not only to cases where the injury is the direct and immediate result of failure to stop the train, but also where the injury results from thus causing these unexpected and unknown hazards which result in employee's injuries—as they frequently do. (See quotations in this brief, pages 14 to 22, from *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, and other cases *et seq.*)

When the air-brake-hose burst on this night, about 3:40 a. m., where it was very dark, with a ground fog, and the front of the engine was on a rather short trestle-bridge over a highway which crossed underneath, and the location of this engine on the trestle-bridge was not observable by the plaintiff or any member of the train crew (R. 75, 104-105, 108-110), it then became the duty of the train crew, and particularly the conductor, to see that this express train, and particularly its air-brake-hose and apparatus, were repaired and placed in such condition as to continue the trip as soon as possible; and plaintiff therefore proceeded to do his work properly—the details of which are set forth in the statement of facts in this brief. While doing so, and in endeavoring to get back with a new air-brake-hose to the place where the old brake-hose had broken, he fell onto the highway underneath and received his injuries. So it will be seen that the fundamental, initial and continuous cause of plaintiff's injuries was a result of said violation.

No better or more complete reply and answer to the appellant's various contentions herein on the issue of the injuries being a result "in whole or in part" of de-

fendant's violation of the Safety Appliance Act could be made than that set forth in the stenographic record of the hearing on the motion for a new trial herein, in which Wyzanski, D. J., directed himself to that specific question (R. 112):

Of course, Judge Wyzanski's decision is in complete accordance with the following decisions of the United States Supreme Court:

In *Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (decided January 3, 1949), Mr. Justice Black, writing for the Court, said at page 521:

> "The train unexpectedly stopped just before the crash occurred because the air in its brake lines escaped, thereby locking the brakes. The air had escaped because of a violation of the Federal Safety Appliance Act in that the threads on a valve were so badly worn that a nut became disconnected."

And at page 522:

> "*First.* We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes it thereby 'violated no duty owing' to the decedent. That court said that the object of the Safety Appliance Act 'insofar as brakes might be concerned, is not to protect employees from standing, *but from moving trains*'.
>
> "*We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train*

because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. *Fairport, P. & E. R. Co.* v. *Meredith,* 292 U. S. 589, 597. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.' *Brady* v. *Terminal R. Assn.,* 303 U. S. 10, 16; *Louisville & N. R. Co.* v. *Layton,* 243 U. S. 617, 621."

In *Carter* v. *Atlanta & St. Andrews Bay Railway Co.,* 338 U. S. 430 (decided December 19, 1949), the Court said at page 434:

"In this situation the test of causal relation stated in the Employers' Liability Act is applicable, the violation of the Appliance Act supplying the wrongful act necessary to ground liability under the F. E. L. A. See *Moore* v. *Chesapeake & Ohio R. Co.,* 291 U. S. 205, 216 (1934); *O'Donnell* v. *Elgin, Joliet & Eastern R. Co., supra; Coray* v. *Southern Pacific Co.,* 335 U. S. 520 (1949). Sometimes that violation is described as 'negligence per se', H. R. Rep. No. 1386, 60th Cong., 1st Sess., p. 6; *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 484 (1916); but we have made clear in the *O'Donnell* case that that term is a confusing label for what is simply a violation of an absolute duty.

"Once the violation is established, only causal relation is in issue. And Congress has directed

liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act. We made clear in *Coray* v. *Southern Pacific Co., supra,* 335 U. S. at 523, that if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff. See also *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 333 (1918); *Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 510 (1916)."

In *Urie* v. *Thompson,* 337 U. S. 163 (decided May 31, 1949), the Court said at page 189:

"For where § 1 'refers to "any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances", etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as "negligence"—what is sometimes called negligence *per se.*' *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 484.

"In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law. Thus taken, as has been the consistent practice, the Boiler Inspection and Safety Appliance Acts cannot be regarded as statutes wholly separate from and independent of the Federal Employers' Liability Act. They are rather supplemental to it, having the purpose and effect

of facilitating employee recovery, not of restricting such recovery or making it impossible."

See also *O'Donnell* v. *Elgin, Joliet & Eastern Railway Co.*, 338 U. S. 384; *Affolder* v. *New York, Chicago & St. L. Railroad Co.*, 339 U. S. 96; *Myers* v. *Reading Co.*, 331 U. S. 477.

The Supreme Court in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (decided January 3, 1949), said at page 523:

"In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death. *Davis* v. *Wolfe*, 263 U. S. 239, 243; *Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 509, 510."

And at page 524:

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths resulting in whole or in part from defective appliances such as were here maintained. 45 U. S. C. § 51. And to make its purpose crystal clear, Congress has also provided that 'no such employee • • • shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the • • • death of such employee.' 45 U. S. C. § 53. Congress has

thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

In *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 182 F. (2d) 949 (decided June 23, 1950), the Circuit Court for the Eighth Circuit said at page 952:

"And as to causal relationship, the court in such a case equally has no right to direct a verdict on legalistic refinements between remote and immediate causation. *Cf. Carter* v. *Atlanta & St. Andrews Bay Ry. Co., supra,* 338 U. S. 430; 70 S. Ct. at pages 228 and 229. The Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, et seq., which is the vehicle of suit for injury from a violation of a Safety Appliance Act, gives the employee a recovery right, even though the violation has been only 'in part' responsible for the injury. 45 U. S. C. A., Sec. 51. The causal question therefore too must be allowed to go to the jury in every case where there is probative evidence from which it would be rationally possible for any one to be persuaded that the violation has been 'a contributory proximate cause' of the injury. *Coray* v. *Southern Pacific R. Co.*, 335 U. S. 520, 523, 69 S.

Ct. 275, 277, 93 L. Ed. 208. The choice between the conflicting theories of causation, each of which is a rational possibility on some probative fact or facts, is one which the jury alone is entitled to make. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572."

In *Carter* v. *Atlanta & St. Andrews Bay Railway Co.*, 338 U. S. 430 (decided December 19, 1949), the Court said at page 434:

> "Once the violation is established, only causal relation is in issue. And Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act. We made clear in *Coray* v. *Southern Pacific Co., supra,* 335 U. S. at 523, that if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff. See also *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 333 (1918); *Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 510 (1916)."

In *Brady* v. *Terminal Railroad Association,* 303 U. S. 10 (decided January 31, 1938), the Court said at page 15:

> "The statute has been liberally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act.' *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.,* 294 U. S. 529, 531. In *Davis* v. *Wolfe,* 263 U. S. 239, 243, reviewing the earlier cases, the Court held that one can recover 'if the failure to comply with the requirements of the act is a proximate cause of the

accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.' "

The Court of Appeals for the Seventh Circuit in *Eglsaer* v. *Scandrett*, 151 F. (2d) 562 (decided October 25, 1945), devoted its entire opinion to an analysis of the most recent decisions of the Supreme Court with reference to the doctrine of proximate cause, which at one point in a quotation in its opinion it describes as "approximate cause". The opinion is extremely interesting because it makes a complete analysis of the authorities and also the textbook writings on this question. The judge writing the opinion himself stated at page 565:

> "Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence *'in part'* results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation',—if the injury or death resulted *'in part'* from defendants' negligence, there is liability.

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident. Such a rule found some support in Wisconsin before the statute in question was passed. In *Stefanowski* v. *Chain Belt Co.*, 129 Wis. 484, 109 N. W. 532, 533, 7 L. R. A., N. S., 955."

See also *Brown* v. *New York Central R. R.*, 53 F. (2d) 490; *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350, at page 354:

There are opinions in cases decided many years before the cases cited and quoted in this brief which do not recognize the recent development of the doctrine of causation under the Federal Employers' Liability Act established by the above recent line of decisions of the Supreme Court of the United States. These older decisions, as far as they relate to the doctrine of causation, are obsolete and, in effect, overruled by the decisions cited by the respondent.

In this particular case the jury had the benefit of a very clear, definite and informative charge of the Court on the principles of law by which the jury were to be guided in deciding the questions of defendant's liability herein.

Judge Wyzanski charged the jury, in part, as follows:

"The lawyers in the case have now agreed that

> the only problems which have to be put to you arise under the Federal Safety Appliance Act. That is an Act of Congress which has been on the books now for over half a century and has to do with the duty which is imposed upon the owner and operator of a railroad. A railroad is required, as a matter of absolute duty, to have safe brakes and appliances in connection with the braking mechanism; that is to say, it is the absolute obligation of the railroad to have its brakes in good order. *Liability flows if there is a violation of that absolute duty and that violation is the cause, in whole or in part, of an injury sustained by the plaintiff.*" (R. 93)

Of course, at the trial the petitioner did not, as required by Rule 51 of the Federal Rules of Civil Procedure, object to any of the above instructions or suggest that they were in the slightest degree erroneous—which petitioner's counsel was obliged to do at the trial if he wished to thereafter claim that it was erroneous.

Of course, no contention could have been sensibly made that any one of such instructions was erroneous.

The fact is, of course, that the petitioner was attempting to defend a very bad case against it and had no defense as to its having violated the Safety Appliance Act, and that the violation thereof was at least "in whole or in part" the cause of plaintiff's injury.

On the liability issue the defendant at the trial had no evidence to refute plaintiff's claim of liability.

There was no evidence upon which the petitioner could claim that it had not violated the Safety Appliance Act with reference to adequate power-brakes, and no one could sensibly claim that as a matter of fact *such failure* and

violation of the Safety Appliance Act did not at least "in part" result in plaintiff's injury.

There was no merit in the defense then, and of course there is none now.

The record shows that the defendant at the trial made no objection to the charge except as to the Court's failure to charge (R. 101-102) the defendant's 22d and 23d requests, which are as follows (R. 21):

> "22. The evidence in this case does not warrant a finding that there was a violation of Sections 1 and 9 of the Federal Safety Appliance Act.
>
> "23. The evidence does not warrant a finding that any violation of the Federal Safety Appliance Act caused the plaintiff's injuries."

This merely raised the legal question as to the correctness of petitioner's claim that the evidence did not warrant a finding that there was a violation of Sections 1 and 9 of the Federal Safety Appliance Act; and does not warrant a finding that the violation of the Act, in whole or in part, caused the plaintiff's injuries.

We assume that the defendant's counsel knew, or should have known, of the provisions of Rule 51 relating to the Court's giving, or failure to give, the jury an instruction.

No one can now urge that defendant complied with this rule, and did not then take proper objections, and surely did not state "distinctly the matter to which he objects and the grounds of his (petitioner's counsel's) objection."

Applicable Rule 51 prevents any assignment now of any such alleged error, and prohibits the petitioner from claiming in this Court that the trial judge committed such an error.

II

The Court's charge to the jury on "causation" was adequate, complete, and indeed replete (R. 93, 94, 95, 99, 100). The "record" presents no question reviewable here as to "legal causation";—there was no objection to the charge as required by Rule 51 of the Federal Rules of Civil Procedure; nor any petitioner's request for instruction on any such question, and no exception to the Court's charge on causation, which charge petitioner now seeks to review in this Court.

The District Judge below adequately, clearly and correctly charged the law on the issue of "causation of plaintiff's injuries" herein in the language of the Federal statute (R. 94-95), and clearly and correctly explained the application of same to this particular case.

The Court (R. 93), after charging the jury upon the necessity of the railroad company having its brakes in good order, charged:

> "Liability flows if there is a violation of that absolute duty *and that violation is the cause, in whole or in part,* of an injury sustained by the plaintiff. I shall go over that in somewhat more detail in a minute."
>
> • • • • • • • •

And again the Court charged (R. 94-95):

> "The first issue having been disposed of, I now come to what is the second issue and this is a much more difficult issue. Now, if there was a failure of the company to live up to its absolute obligation with respect to the braking mech-

anism, was that failure—to use the statutory language—*in whole or in part the cause of an accident suffered by Mr. Leary? In order to satisfy this formula—'in whole or in part'*—it isn't necessary for the plaintiff to show that the cause was exclusively and immediately and directly due to some impact caused by the putting on of the brake or the failure to put on the brake. *It is a question, ultimately, of fact as to whether the failure of the braking mechanism was a cause—not necessarily immediately, but a cause of the injury sustained. There must be a causal connection, however. It isn't enough that a man was on a train where the brakes were defective and he got off the train and he was injured. You must be satisfied in your own minds that there was some kind of connection of a causal nature between the failure of the brakes and the injury which occurred.*"

• • • • • • • •

And again (R. 95) the Court further said:

"And here the second issue, as I have said to you, *is whether, if there was a defect in the braking mechanism, that defect was in whole or in part the cause of the injury sustained.* If you decide that in the affirmative, you will then go on to the question of damages. If you decide in the negative, that is the end of the case."

• • • • • • • •

"Let's assume, without indicating my own view at all, that you have decided that there was a defect in the brake or the hose attached thereto *and that defect was in whole or in part the cause of the injury.*"

• • • • • • • •

The Court's further charge appears on R. 95, 96, 97 and 98, and then, as the Court was about to finally submit the case to the jury, the Court further said (R. 99):

> "I hope you will first find out how the injury was sustained and whether or not there is a violation of the Safety Appliance Act, and after you have unanimity on that issue go to the next one—*if you have to go to the next one, which is was the violation in whole or in part the cause of the injury to the plaintiff, and seek unanimity on that. If you are unanimously for the plaintiff on that, you go to the third issue. If you are unanimously for the defendant, you fill in the form which is called the Defendant's Verdict, and don't put in any dollars or cents but just sign your name.*"
>
> • • • • • • • •
>
> "*If you, on the other hand, take the view as a Jury that this is a case in which violation of the Safety Appliance Act was in whole or in part the cause of the injury, then you proceed to the problem of damages.*"

The District Judge's last statement to the jury was as follows (R. 100):

> "The rules of law, which you are in honor and good conscience bound to apply, state that *the plaintiff is entitled to prevail only if he persuades you that there was a violation of the Safety Appliance Act; that violation was in whole or in part the cause* of the injury * * *."

The above quotations from the Court's charge show that *in seven different parts of the charge the Court charged the jury that there must be a violation of the*

afety Appliance Act, and not only that, but further that his violation must be in whole or in part the cause of he injury.

The respondent cannot understand how the Trial Judge ould have more completely and correctly charged the ıry on the question of the Safety Appliance Act violaon, and more distinctly *submitted to the jury as an sue of fact, the determination to be made by them,* as whether or not it was the cause in whole or in part plaintiff's injury.

The record on appeal herein shows that this case was ied for the defendant-petitioner by its attorney of ecord, Mr. Deering. The record suggests that a Mr. artlett, an attorney, was present during the charge—ossibly as an associate to Mr. Deering; as a consultant advisor.

Mr. Deering opened and closed the case to the jury, ıd made requests to charge on other matters; and, finly, after it was agreed between counsel that defendant *uld deduct from the verdict afterwards* (R. 101) the ıounts which it had specifically advanced and loaned the plaintiff (presumably while it was endeavoring settle with him before this suit was instituted), Mr. ırtlett, who was appearing either apparently as a unsel or advisor to defendant's trial counsel, said in ıswer to the Court's query:

> "The Court: All right. Is there anything else, Gentlemen?
>
> "Mr. Bartlett: Well, your Honor, I don't claim to be an authority on causation, but I, as a juryman, would say, 'Sure, there was a cause'. There is no explanation what a condition is.
>
> "The Court: No explanation of what?

"Mr. Bartlett: What is legal condition, and what is legal causation.

"The Court: Do you want to define it for me?

"Mr. Bartlett: No, I don't." (R. 102.)

The above occurred just before the jury was sent out to deliberate, at the judge's bench—of course, not in the presence of the jury.

By what stretch of the imagination can this be called an objection by a party? Apparently it was just Mr. Bartlett expressing his opinion to the trial judge. One might describe it as "just chatting". It certainly was no objection to the Court's charge, or request for instruction.

When the Court then questioned Mr. Bartlett, neither Mr. Deering nor Mr. Bartlett made any request for an instruction to the jury as to just what was the difference between a legal "condition" and a legal "causation", or suggest or make any request for any further instruction about causation.

It would seem to be rather childish to contend that this was a compliance with Rule 51, which reads (in part) as follows:

> "No party may assign as error the giving or the failure to give an instruction *unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury."

The query would seem to arise: How could any "party", upon what occurred at the trial, *now* "assign as error" the giving or the failure to give an instruction

with reference to the difference between legal condition and legal cause?

We suggest that it is not possible for any person to make any sensible contention to establish this proposition, because it clearly shows that the petitioner did not object to any relevant part of the charge, and did not make any request for any instruction whatever upon this question.

Upon this record, the petitioner upon this proposition has just "nothing" to present to this Court.

Mr. Bartlett's first statement was very indefinite and quite incomplete. He merely stated that there was no explanation of what a condition is, and when the Court said: "No explanation of what?" he merely replied: "What is legal condition, and what is legal causation."

Nothing was said whatever about how it could be applicable to this case. And when the Court said "Do you want to define it for me?" Mr. Bartlett merely replied: "No, I don't."

This is precisely the point where, if he had any objection to the charge or "failure to give an instruction", he should have then and there made a request to the Court to instruct the jury and have stated in definite language any request to charge, if he had one.

However, Mr. Bartlett said nothing further except "No, I don't." In other words, he declined, or surely failed, to make a request for an instruction.

We would like to know how any sensible and truthful person could now say that he, or anybody representing the petitioner, then complied with the very important Rule 51.

In view of this record, we are amazed to find the following language in III of petitioner's Argument on this question (p. 19, Petitioner's Brief):

> "The trial judge erred in failing to charge the jury as requested as to the difference between legal condition and legal causation."

No "request to charge" was made to the trial judge.

This colloquy cannot possibly be construed to amount to anything more than that a Mr. Bartlett—who did not try the case, but was apparently advising and consulting with Mr. Deering, the attorney of record—said in a discussion with the judge at the bench that possibly it might be well if the judge had charged on the subject of condition and causation, etc.

Under Rule 51, in order to claim a failure to instruct or rule in that regard, a request for a charge or ruling was required to be made to the trial judge with sufficient clarity to explain to the trial court defendant's position, and to give the trial court the opportunity to consider those questions and decide on rulings with reference thereto.

This same petitioner in another case, *New York, New Haven & Hartford Railroad Co.* v. *Zermani*, decided by the United States Court of Appeals for the First Circuit on December 8, 1952, 200 F. 2d 240 and certiorari denied by the United States Supreme Court, Oct. Term, 1952, No. 582, March 16, 1953, ... U. S. .... 97 L. ed. (Advance, p. 591), raised this same proposition, and the Court of Appeals decided that Rule 51 must be complied with, and that it had not complied with it in that case. In that case the Court of Appeals said (200 F. 2d 240, at 245):

"The purpose of Rule 51 is to require the parties to enable the trial court to 'clarify or correct his statement before the jury retires.' *McDonald* v. *Jarka Corporation*, 144 F. 2d 53, 54 (2d Cir. 1944). See *Williams* v. *Powers*, 135 F. 2d 153 (6 Cir. 1943); *Alcaro* v. *Jean Jordeau*, 138 F. 2d 767 (3d Cir. 1943) and *Blair* v. *Cullom*, 168 F. 2d 622 (2d Cir. 1948). Although defendant's counsel did not remain completely silent as in *Alaska Pacific Salmon Co.* v. *Reynolds Metals Co.*, 163 F. 2d 643, 658 (2d Cir. 1947), yet it does not appear that his objection was clearly stated. The language in *Rosenfeld* v. *Curtis Pub. Co.*, 163 F. 2d 660, 663 (2d Cir. 1947), seems appropriate here:

"'* * * But it seems to us it was for counsel to realize that the judge had not recalled or repeated all of what had happened and to take such steps as were necessary to bring this home to the judge. Such imprecision in asserting alleged *error* is destined to produce at the most only confusion as to what is in counsel's mind and what is desired of the court. We do not think a verdict justified on the evidence and by the trial generally should be upset when counsel have thus failed to make their criticisms of the judge clear to him at the time. Under the circumstances the court's refusal to add to the original charge was not reversible error.'"

Of course, in the *Zermani* case, immediately above referred to, the record was much more favorable to the petitioner than it is here. Here the petitioner has nothing—nothing whatever—to indicate any attempt to comply with Rule 51, or even that petitioner's counsel was aware of its existence. In any event he certainly did not

make any request for an instruction. At most it could be considered only an informal discussion, or rather merely a comment to the Court.

Upon the merits of this question, it is all-sufficient to say—as in the *Coray* case, *supra,* and others cited in this brief in our main argument—that the United States Supreme Court has held that similar facts relating to violation of the Safety Appliance Act did not merely establish a *condition,* but did establish a violation of the Safety Appliance Act which surely was at least "in part" a cause of the injury.

In the *Coray* case the appellant also made the claim that the violation of the Act merely established a condition and not a cause, but it was held that the injury resulted "in whole or in part" from the violation of the Safety Appliance Act.

The opinion in the *Coray* case shows that the appellant in that case raised the very same question as the petitioner here, as to whether the violation of the Safety Appliance Act merely caused conditions to exist which in and of themselves could not be considered a legal cause of injury. The Supreme Court rejected that contention and analyzed and discussed it at length, 335 U. S. 520, at page 524, and held that the injury, according to the statute, "resulted in whole or in part" from the violation of the Safety Appliance Act:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' death 'resulting in whole or in part' from defective appliances such as were here maintained. 45 U. S. C., Sec. 51. And to make its purpose crystal

clear, Congress has also provided that 'no such employee * * * shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the * * * death of such employee.' 45 U. S. C., Sec. 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

The record, however, plainly shows that the trial judge here (Wyzanski, J.) very accurately, definitely and fully charged the jury upon the question of the defendant's liability for the violation of the Safety Appliance Act, and stated that the question submitted to them was whether the failure of the braking mechanism was a cause of the injury sustained, and stated that there must be a causal connection, and stated: "It isn't enough that a man was on a train where the brakes were defective and he got off the train and he was injured" (R. 95).

The plaintiff, from beginning to end, stated that the defective air-brake-hose which broke produced this immediate unscheduled stop, with the engine in a position causing sudden and unexpected great dangers and hazards to the train crew, who were immediately then oblig-

ed to do work in an endeavor to get the train started again, and that this initial Safety Appliance Act violation, by continuous chain reaction, most certainly caused the injury to this plaintiff.

Any layman could understand this Court's precise and definite language.

Furthermore, the respondent desires to again assert that when the Court thus correctly charged that it was not necessary for the plaintiff to show that the cause was exclusively and immediately and directly due to some impact caused by putting on the brake or the failure to put on the brake, and that it was a question ultimately of fact as to whether the failure of the braking mechanism was a cause, not necessarily immediate, but a cause of the injury sustained, that this petitioner then did not apparently even think of making any objection to that part of the charge and said absolutely nothing; and it stands as the unchallenged law of the case.

And we again assert that, if this Rule 51 is not disregarded altogether, the question, as now suggested by the petitioner, as to condition and cause, etc., is not presented by this appeal.

We suggest that it is entirely clear that the petitioner cannot complain of the Court's charge herein, or the alleged *failure of the Court to charge as petitioner now suggests;*—first, because the Court's charge on "causation" was entirely correct, and on this particular question it was much more favorable to the petitioner than it had any right to legally expect. It would seem that the Court could and should have charged as matter of law that there was a failure of the petitioner to live up to its absolute obligation to supply brakes and braking mechanisms and appliances appurtenant thereto which were at all times in good order. Nevertheless, the Court

merely said that the jury could find as matter of fact that there was a failure of the petitioner to have its train equipped with such adequate brakes. The Court then submitted to the jury as a question of fact whether, if there was a failure of the company to live up to its obligation with respect to the braking mechanism,—"• • • was that failure—to use the statutory language—in whole or in part *the cause of an accident* suffered by Mr. Leary? In order to satisfy this formula— in whole or in part'—it isn't necessary for the plaintiff to show that the cause was exclusively and immediately and directly due to some impact caused by the putting on of the brake or the failure to put on the brake. It is a question, ultimately, of fact as to whether the failure of the braking mechanism was a cause—not necessarily immediately, but a cause of the injury sustained. There must be a causal connection, however. It isn't enough that a man was on a train where the brakes were defective and he got off the train and he was injured. You must be satisfied in your own minds that there was some kind of connection of a causal nature between the failure of the brakes and the injury which occurred. I am not going to make any observations as to what I think about this matter for it is a matter of your own information. I may tell you I am scrupulously avoiding coming in my own mind to any conclusion on this question. It is a Jury question, and it is a question on which the plaintiff has—as he has on the first and on the last issue—the burden of proof. That is, the plaintiff must persuade you that his side of the story is right—not that it is right beyond a reasonable doubt, but it probably right." (R. 94-95.)

To all of the above, as shown by the Record, the petitioner made no objection and took no exception, and made no request for instruction before the jury retired to consider its verdict, and did not state at all, distinctly

or otherwise, as required by the aforesaid Rule 51— " * * * stating distinctly the matter to which he objects and the grounds of his objection. * * *."

Therefore, we contend that upon the record here the petitioner cannot assign any alleged error in giving or failing to give any further instruction on "causation", as is now suggested by the petitioner herein.

We respectfully suggest that this claim of alleged error is not only obviously unsound, but is a matter which cannot legally be presented to this Court on the record in the District Court (R. 102).

The Record on Appeal herein (R. 111-113) contains a stenographic record of a hearing on petitioner's motions for judgment notwithstanding verdict and for a new trial, and the opinion of the District Judge (Wyzanski, D. J.) on said motions. This opinion clearly and convincingly shows—indeed demonstrates—that the violation of the Safety Appliance Act herein was the cause of plaintiff's injury—and, to use the language of Mr. Justice Black in the *Coray* case, *supra*, the bursting of the air-hose, the stoppage of the train, the defendant's violation of the Safety Appliance Act, and all of the circumstances continuously leading up to plaintiff's fall and injuries, were "all * * * circumstances * * * inseparably related to one another in time and space", and therefore was the cause of plaintiff's injuries (*Coray* v. *So. Pac. Co.*, 335 U. S. 520, at 524).

III

Neither the petitioner's answer herein, nor this appeal record, PRESENTS its claim here relating to alleged payments from the Government to the plaintiff under the Railroad Retirement Act; and in any event this claim is herein utterly unsound and without merit.

As stated in our Summary above, the Court of Appeals in this case (204 F. 2d 461, at 468) discusses and correctly disposes of this *unpleaded* and *belated* contention of the petitioner.

In the defendant's answer (wherein it demanded judgment dismissing the plaintiff's complaint [R. 14]) there is no plea of separate defense except that the defendant made payments to the plaintiff totalling $3225 (which the defendant had advanced to plaintiff before he instituted suit and while it was endeavoring to settle with him), and for which the plaintiff agreed that they were entitled to make a reduction (R. 101), and it was agreed at the trial that the defendant could deduct that amount "from the verdict afterwards", and defendant's counsel said it was not necessary to let the jury consider it (R. 101-102).

The defendant's answer made no reference whatever to any payments from the Railroad Retirement Fund, and did not suggest any such set-off or partial or affirmative defense. The only reference to the matter will be found in the Record at pages 66-68.

The "answer" presented no claim of separate defense that the defendant contributed to some Railroad Retirement Fund, or that the plaintiff has received, or may receive, or is entitled to receive, some sum as payment of pension from the Railroad Retirement Fund; and it is an idle and absurd gesture for the petitioner to herein make the contention in this Court that the petitioner is entitled to a reversal of this judgment and a new trial because of *anything* set forth in its brief relating to the Railroad Retirement Fund.

Under the Federal Rules of Civil Procedure, General Rules of Pleading, Rule 8 (c), the defendant was obliged to set forth "* * * *payment* * * * and any other matter constituting an avoidance or affirmative defense".

Under the Federal Rules of Civil Procedure, Rule 13, a set-off or recoupment is treated as a counterclaim and must be pleaded (*Chicago, Great W. R. R.* v. *Peeler,* 140 F. (2d) 865).

Under these Rules of Civil Procedure, 8 (c) and 13 (a), (b) and (c), the defendant was obliged to plead any alleged payments or set-off in reduction of damages. Having failed to so plead, the defendant could not put in any evidence to establish any alleged set-off, and certainly cannot now raise the question upon this application.

If the defendant had properly pleaded payments by the defendant to any fund for the benefit of the plaintiff as to which under the law it would be entitled to recoupment *from the plaintiff,* an entirely different proposition would be presented, but no such situation exists in this case either upon the facts or the law.

As a matter of fact and law, the defendant made no such payments to the plaintiff (R. 66-68). At the most it merely made some unspecified payment to the Govern-

ment which the *Government received and collected as an internal-revenue tax* (Title 26, U. S. C., Sec. 1530)—not for the benefit of the plaintiff, but solely from which a fund could be established from moneys supplied by (1) the plaintiff, (2) the defendant and its shippers and passengers, and (3) the general public and the Government.

Under the Federal Employers' Liability Act, Title 45, Sec. 55, payments which a railroad employee might receive from the United States Government under the Railroad Retirement Act are not admissible or provable as a defense, in mitigation of damage or otherwise, in an action under the Federal Employers' Liability Act for damages for personal injuries.

Section 55 reads as follows:

> "Sec. 55. *Contract, rule, regulation, or device exempting from liability; set-off.*
>
> Any contract, rule, regulation. or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

The Railroad Retirement Act does not constitute "any insurance, relief benefit, or indemnity."

The Railroad Retirement Act is one of the legal pro-

visions of the United States Government which constitutes a part of the general plan of social legislation that has been inaugurated and adopted by the United States Government for the general welfare of the Union.

Payments to railroad employees under the Railroad Retirement Act are made, instead of payments under the Social Security Act, which applies to persons who are not employed by common carriers or certain designated affiliates.

Railroad employees are not entitled to Social Security because they cannot be within the scope of both plans of legislation as they are mutually exclusive.

Persons not employed by railroads are within the coverage and protection of either the Social Security Act or the Fair Labor Standards Act of 1938, 29 *U. S. C., Sec.* 201, *et seq.* No one would ever claim that Social Security or other benefits should be deducted in mitigation of damages in personal injury suits. A railroad employee is solely under the coverage and protection of the Railroad Retirement Act of 1937, 45 U. S. C., Sec. 228a, *et seq.*, the Railway Labor Act, 45 U. S. C., Sec. 151, *et seq.*, the Carriers Taxing Act of 1937, 26 U. S. C., Int. Rev. Code, Sec. 1500, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U. S. C., Sec. 351, *et seq.* (See *Northern Pacific Ry Co.* v. *Reynolds*, 68 F. Supp. 492).

The taxes which provide the income for the railroad retirement system are collected under the Railroad Retirement Tax Act, Int. Rev. Code, Title 26, U. S. C., Secs. 1500-1538.

Under the provisions of that Act both the employer and the employee now contribute equally at the rate of 6¼% of compensation up to $300 per month (see Title 26, Secs. 1500, 1520). Under Section 1530 the taxes paid

are paid to the Treasury of the United States as internal-revenue collections.

Section 1530 (a) reads as follows:

> "Sec. 1530. *Collection and payment of taxes*—(a) *Administration.* The taxes imposed by this subchapter shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue collections."

In addition to the taxes collected, Congress has appropriated an amount to be transferred to the retirement account in annual installments, equal to (1) the combined railroad and employees taxes that would have accrued during periods of creditable military service from September, 1939, through June, 1948, if the employees had remained in railroad service and earned $160 a month, and (2) the actuarial value of additional benefits based on creditable military service performed before 1937 (45 U. S. C., Secs. 228c (m); 228o (p).

The amount transferred from the Treasury during 1951-52 came to $770,662,000. This included $33,000,000 which represented the 1951-52 installment of the military service appropriation. In addition, $78,889,000 was earned on investments. In all, $849,551,000 was made available to the retirement account during the year. After deducting the $394,153,000 paid to railroad employees and their families in benefits under the retirement and survivor programs, and the $6,331,000 spent for administering these programs, the excess of income over outgo for the years was $449,067,000. This amount raised the total reserve on June 30, 1952, to $2,868,969,000. Any part of the reserve not immediately needed for benefit payments or administrative expenses is invested in 3% Treasury notes, and the interest earned becomes a further source

of income to the retirement account. (See Monthly Review, Railroad Retirement Board, August, 1952, Vol. 13, No. 8, pp. 147-148; Title 45, U. S. C., Sec. 228o).

The United States Government also makes fitting appropriations for the administration expenses of the Railroad Retirement Board and the administration of the Act (Title 45, U. S. C., Sec. 228p).

From the provisions of the Act it is clear that the moneys paid under the Railroad Retirement Acts are paid by the United States Government out of moneys collected from the employee, the employer, and the general public, and are not payments by the railroad, and any contributions paid by the railroad are out of moneys collected by it from shippers and passengers in the course of its operations, and estimated by the various Public Service Commissions and the Interstate Commerce Commission in the fixing of permissible rates by railroads, and cannot be specifically ear-marked as any set-off or payment or in mitigation or diminution of damages awardable under the Federal Employers' Liability Act.

It is generally established that a wrongdoer causing a plaintiff damages is not entitled to have the damages for which the wrongdoer is liable reduced by proving that the plaintiff has received or will receive compensation from a collateral source (*Brabham* v. *Baltimore & O. R. Co.*, 220 F. 35; *S. H. Kress Co.* v. *Bullock Shoe Co.*, 56 F. (2d) 713; *Terry* v. *Jewett*, 78 N. Y. 338; *Briggs* v. *N. Y. C. & H. H. R. R. Co.*, 72 N. Y, 26; *McCarthy* v. *Palmer*, 29 F. Supp. 585).

The opinions rendered in *Hetrick* v. *Reading Co.*, 39 F. Supp. 22, and *McCarthy* v. *Palmer*, 113 F. (2d) 721 (cert. den. 311 U. S. 680), contain a full and complete analysis of the reasons why Railroad Retirement Act payments cannot be proved in mitigation of damages in Federal Employers' Liability Act cases, in addition to

those set forth in this brief. Reference is made to those opinions without reiteration here.

The petitioner, in its efforts to raise the question of the Railroad Retirement Act payments, cites the *McCarthy* and *Hetrick* cases, and makes the contention that "We do not believe that the precise question has been passed upon by this Court" (page 22, petitioner's brief), but completely fails to make any argument or legal presentation in an effort to persuade this Court that the trial court's ruling was wrong or that the rulings in the *McCarthy* and *Hetrick* cases were wrong. No cases are cited in opposition. No argument is made in opposition. All that the point contains is the bald statement that the proof should have been admitted.

If the petitioner cannot cite any authorities or present any plausible argument to support its position, the respondent submits that the question is not worthy of consideration by this Court on this application.

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

FEDERAL STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE CITED IN THIS BRIEF.

United States Code, Title 26.

"SUBCHAPTER B.—EMPLOYMENT BY CARRIERS

"PART I.—TAX ON EMPLOYEES

"§ 1500. *Rate of tax.*

"In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentage of so much of the compensation, paid to such employee after December 31, 1946, for services rendered by him after such date, as is not in excess of $300 for any calendar month:

"1. With respect to compensation paid during the calendar years 1947 and 1948, the rate shall be 3¼ per centum;

"2. With respect to compensation paid during the calendar years 1949, 1950, and 1951, the rate shall be 6 per centum;

"3. With respect to compensation paid after December 31, 1951, the rate shall be 6¼ per centum. (53 Stat. 179; July 31, 1946, ch. 709, § 3 (a), 60 Stat. 723.)"

• • • • • • • •

"PART III.—TAX ON EMPLOYERS

"§ 1520. *Rate of tax.*

"In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation, paid by such employer after December 31,

1946, for services rendered to him after December 31, 1936, as is, with respect to any employee for any calendar month, not in excess of $300: *Provided, however,* That if an employee is paid compensation after December 31, 1946, by more than one employer for services rendered during any calendar month after 1936, the tax imposed by this section shall apply to not more than $300 of the aggregate compensation paid to such employee by all such employers after December 31, 1946, for services rendered during such month, and each employer other than a subordinate unit of a national railway-labor-organization employer shall be liable for that proportion of the tax with respect to such compensation paid by all such employers which the compensation paid by him after December 31, 1946, to the employee for services rendered during such month bears to the total compensation paid by all such employers after December 31, 1946, to such employee for services rendered during such month; and in the event that the compensation so paid by such employers to the employee for services rendered during such month is less than $300, each subordinate unit of a national railway-labor-organization employer shall be liable for such proportion of any additional tax as the compensation paid by such employer after December 31, 1946, to such employee for services rendered during such month bears to the total compensation paid by all such employers after December 31, 1946, to such employee for services rendered during such month:

"1. With respect to compensation paid during the calendar years 1947 and 1948, the rate shall be 5¾ per centum;

"2. With respect to compensation paid during the calendar years 1949, 1950, and 1951, the rate shall be 6 per centum;

"3. With respect to compensation paid after December 31, 1951, the rate shall be 6¼ per centum. (53 Stat. 180; July 31, 1946, ch. 709, § 3 (d), 60 Stat. 724.)"

• • • • • • • • •

"PART IV.—GENERAL PROVISIONS

"§ 1530. *Collection and payment of taxes*—(a) *Administration.*

"The taxes imposed by this subchapter shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue collections."

[Subdivisions (b), (c) and (d) are not necessary for this presentation, and are not copied.]

United States Code, Title 28, Rules of Civil Procedure.

"RULE 8.—GENERAL RULES OF PLEADING

"(c) *Affirmative defenses.*

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

[Subdivisions (a), (b), (d), (e) and (f) are not necessary for this presentation, and are not copied.]

* * * * * * * *

"RULE 13.—COUNTERCLAIM AND CROSS-CLAIM

"(a) *Compulsory counterclaims.*

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) *Permissive counterclaims.*

"A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

"(c) *Counterclaim exceeding opposing claim.*

"A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."

[Subdivisions (d) to (i), inclusive, are not necessary for this presentation, and are not copied.]

* * * * * * * *

"RULE 51.—INSTRUCTIONS TO JURY: OBJECTION

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury

on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

United States Code, Title 45, Chapter 9.

"RAILROAD RETIREMENT ACT OF 1937

* * * * * * * *

"§ 228p. *Appropriation.*

"There is hereby authorized to be appropriated from time to time such sums as may be necessary to provide for the expenses of the Board in administering the provisions of sections 228a to 228c-1, 228e-228h, 2281-228p, 228r, and 228s and former sections 215-228 of this title. (Aug. 29, 1935, ch. 812, § 16, as added June 24, 1937, ch. 382, part I, § 1, 50 Stat. 317.)"

United States Code, Title 45, Chapter 1.

"SAFETY APPLIANCES AND EQUIPMENT ON RAILROAD ENGINES AND CARS, AND PROTECTION OF EMPLOYEES AND TRAVELERS

"§ 1. *Driving-wheel brakes and appliances for operating train-brake system.*

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any

locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Mar. 2, 1893, ch. 196, § 1, 27 Stat. 531.)

* * * * * * * *

"§ 9. *Number of cars to be operated with power or train brakes; increase of number.*

"Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section. (Mar. 2, 1903, ch. 976, § 2, 32 Stat. 943.)"

United States Code, Title 45, Chapter 2.

"LIABILITY FOR INJURIES TO EMPLOYEES

"§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. (Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404).

• • • • • • • •

"§ 55. *Contract, rule, regulation, or device exempting from liability; set-off.*

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. (Apr. 22, 1908, ch. 149, § 5, 35 Stat. 66.)"